



6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R04-OAR-2012-0555; FRL-9728-1]

#### Approval and Promulgation of Implementation Plans; Florida:

#### New Source Review-Prevention of Significant Deterioration;

#### Fine Particulate Matter (PM<sub>2.5</sub>)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to approve changes to the Florida State Implementation Plan (SIP), submitted by the Florida Department of Environmental Protection (FDEP) to EPA on March 15, 2012. The March 15, 2012, SIP revision modifies Florida's New Source Review (NSR) Prevention of Significant Deterioration (PSD) permitting regulations to adopt, into the Florida SIP, federal NSR PSD requirements for the fine particulate matter (PM<sub>2.5</sub>) national ambient air quality standards (NAAQS) as promulgated in EPA's 2008 NSR PM<sub>2.5</sub> Implementation Rule and the 2010 PM<sub>2.5</sub> PSD Increment, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC) Rule. EPA is approving portions of Florida's March 15, 2012, SIP revision because they are consistent with the Clean Air Act (CAA or Act) and EPA regulations regarding NSR permitting.

**EFFECTIVE DATE:** This rule will be effective [insert 30 days after date of publication in the Federal Register].

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2012-0555. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

**FOR FURTHER INFORMATION CONTACT:** For information regarding the Florida SIP, contact Ms. Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Ms. Bradley's telephone number is (404) 562-9352; e-mail address: [bradley.twunjala@epa.gov](mailto:bradley.twunjala@epa.gov). For information regarding NSR, contact Ms. Yolanda Adams, Air Permits Section, at the same address above. Ms. Adams' telephone number is (404) 562-9214; e-mail address: [adams.yolanda@epa.gov](mailto:adams.yolanda@epa.gov). For information regarding

the PM<sub>2.5</sub> NAAQS, contact Mr. Joel Huey, Regulatory Development Section, at the same address above. Mr. Huey's telephone number is (404) 562-9104; e-mail address: [huey.joel@epa.gov](mailto:huey.joel@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

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### **I. Background**

EPA is taking final action to approve portions of Florida's March 15, 2012, SIP revision to adopt federal NSR permitting requirements. Florida's March 15, 2012, SIP revision includes changes to the Florida Administrative Code (F.A.C.) Chapter 62-210, *Stationary Sources – General Requirements, Section 200 – Definitions (rule 62-210.200)*, and Chapter 62-212, F.A.C., *Stationary Sources – Preconstruction Review, Section 300 – General Preconstruction Review Requirements (rule 62-212.300)* and *Section 400 - Prevention of Significant Deterioration (rule 62-212.400)*. These changes adopt federal PSD permitting regulations promulgated in the final rulemakings entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers (PM<sub>2.5</sub>)," 73 FR 28321 (May 16, 2008), hereafter referred to as the "NSR PM<sub>2.5</sub> Rule" and "Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>) – Increments, Significant Impact Levels (SILs) and

Significant Monitoring Concentration (SMC),” 75 FR 64864 (October 20, 2010), hereafter referred to as the “PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule.” EPA is not approving in this action Florida’s incorporation into its SIP of the SIL thresholds and provisions promulgated in EPA’s PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule.

On July 27, 2012, EPA published a proposed rulemaking to approve the aforementioned changes to Florida’s NSR PSD program. *See* 77 FR 44198. Comments on the proposed rulemaking were due on or before August 27, 2012. No comments, adverse or otherwise, were received on EPA’s July 27, 2012 proposed rulemaking. Pursuant to section 110 of the CAA, EPA is now taking final action to approve the changes to Florida’s NSR PSD program as provided in EPA’s July 27, 2012, proposed rulemaking. A summary of the background for today’s final action is provided below. EPA’s July 27, 2012, proposed rulemaking contains more detailed information regarding the Florida SIP revision being approved today and the rationale for today’s final action. Detailed information regarding the PM<sub>2.5</sub> NAAQS and NSR Program can also be found in EPA’s July 27, 2012, proposed rulemaking as well as the abovementioned final rulemakings.

#### **A. NSR PM<sub>2.5</sub> Rule**

EPA finalized the NSR PM<sub>2.5</sub> Rule on May 16, 2008, which revised the NSR program requirements to establish the framework for implementing preconstruction permit review for the PM<sub>2.5</sub> NAAQS in both attainment areas and nonattainment areas (NAA) that: (1) require NSR permits to address directly emitted PM<sub>2.5</sub> and precursor pollutants; (2) establish significant emission rates for direct PM<sub>2.5</sub> and precursor pollutants (including sulfur dioxide (SO<sub>2</sub>) and

nitrogen oxides (NO<sub>x</sub>)); (3) establish PM<sub>2.5</sub> emission offsets; (4) provide exceptions to the grandfathering policy for permits being reviewed under the PM<sub>10</sub> surrogate program; and (5) require states to account for gases that condense to form particles (condensables) in PM<sub>2.5</sub> and PM<sub>10</sub> emission limits in PSD or nonattainment NSR (NNSR) permits. Additionally, the NSR PM<sub>2.5</sub> Rule authorized states to adopt provisions in their NNSR rules that would allow interpollutant offset trading. *See* 73 FR 28321. States were required to provide SIP submissions to address the requirements for the NSR PM<sub>2.5</sub> Rule by May 16, 2011. Florida's March 15, 2012, SIP revision addresses only the PSD requirements related to EPA's May 16, 2008, NSR PM<sub>2.5</sub> Rule.<sup>1</sup>

## **1. PM<sub>10</sub> Surrogate and Grandfathering Policy**

In the NSR PM<sub>2.5</sub> Rule, EPA required that major stationary sources seeking permits must begin directly satisfying the PM<sub>2.5</sub> requirements, as of the effective date of the rule, rather than relying on PM<sub>10</sub> as a surrogate, with two exceptions.<sup>2</sup> The first exception is a "grandfathering" provision in the federal PSD program at 40 CFR 52.21(i)(1)(xi). This grandfathering provision

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<sup>1</sup> Florida's March 15, 2012, SIP revision only addresses the State's PSD permitting program and does not adopt the NNSR permitting requirements for PM<sub>2.5</sub> emission offsets, condensable provision or the discretionary interpollutant trading policy and ratios promulgated in the 2008 NSR PM<sub>2.5</sub> Rule. Moreover Florida is in attainment of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS.

<sup>2</sup> After EPA promulgated the NAAQS for PM<sub>2.5</sub> in 1997, the Agency issued guidance documents related to using PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> entitled: "Interim Implementation of New Source Review Requirements for PM<sub>2.5</sub>," John S. Seitz, EPA, October 23, 1997 (the "Seitz Memo") and "Implementation of New Source Review Requirements in PM-2.5 Nonattainment Areas" (the "2005 PM<sub>2.5</sub> NNSR Guidance"). The Seitz Memo was designed to help states implement NSR requirements pertaining to the new PM<sub>2.5</sub> NAAQS in light of technical difficulties posed by PM<sub>2.5</sub> at that time. The 2005 PM<sub>2.5</sub> NNSR Guidance provided direction regarding implementation of the NNSR provisions in PM<sub>2.5</sub> nonattainment areas in the interim period between the effective date of the PM<sub>2.5</sub> nonattainment designations (April 5, 2005) and EPA's promulgation of final PM<sub>2.5</sub> NNSR regulations (this included recommending that until EPA promulgated the PM<sub>2.5</sub> major NSR regulations, "States should use a PM<sub>10</sub> nonattainment major NSR program as a surrogate to address the requirements of nonattainment major NSR for the PM<sub>2.5</sub> NAAQS.").

applied to sources that had applied for, but had not yet received, a final and effective PSD permit before the July 15, 2008, effective date of the May 2008 final rule. The second exception was that states with SIP-approved PSD programs could continue to implement the Seitz Memo's PM<sub>10</sub> Surrogate Policy for up to three years (until May 2011) or until the individual revised state PSD programs for PM<sub>2.5</sub> are approved by EPA, whichever comes first. On May 18, 2011 (76 FR 28646), EPA took final action to repeal the grandfathering provision at 40 CFR 52.21(i)(1)(xi). This final action ended the use of the 1997 PM<sub>10</sub> Surrogate Policy for PSD permits under the federal PSD program at 40 CFR 52.21. In effect, any PSD permit applicant previously covered by the grandfathering provision (for sources that completed and submitted a permit application before July 15, 2008)<sup>3</sup> that did not have a final and effective PSD permit before the effective date of the repeal will not be able to rely on the 1997 PM<sub>10</sub> Surrogate Policy to satisfy the PSD requirements for PM<sub>2.5</sub> unless the application includes a valid surrogacy demonstration.<sup>4</sup> See 76 FR 28646. In its March 15, 2012, SIP revision, Florida did not adopt the grandfathering provision at 40 CFR 52.21(i)(1)(xi) into its PSD regulations. Therefore, Florida's SIP is consistent with current federal regulations regarding the repeal of the grandfathering provision.

## **2. “Condensable” Provision**

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<sup>3</sup> Sources that applied for a PSD permit under the federal PSD program on or after July 15, 2008, are already excluded from using the 1997 PM<sub>10</sub> Surrogate Policy as a means of satisfying the PSD requirements for PM<sub>2.5</sub>. See 76 FR 28321.

<sup>4</sup> Additional information on this issue can also be found in an August 12, 2009, final order on a title V petition describing the use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub>. In the Matter of *Louisville Gas & Electric Company*, Petition No. IV-2008-3, Order on Petition (August 12, 2009).

In the NSR PM<sub>2.5</sub> Rule, EPA revised the definition of “*regulated NSR pollutant*” for PSD to add a paragraph providing that “particulate matter (PM) emissions, PM<sub>2.5</sub> emissions and PM<sub>10</sub> emissions” shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures and that on or after January 1, 2011, such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for PM, PM<sub>2.5</sub> and PM<sub>10</sub> in permits issued. *See* 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(vi) and “Emissions Offset Interpretative Ruling” (40 CFR Part 51, Appendix S). On March 16, 2012, EPA proposed a rulemaking to amend the definition of “*regulated NSR pollutant*” promulgated in the NSR PM<sub>2.5</sub> Rule regarding the PM condensable provision at 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(i) and EPA’s Emissions Offset Interpretative Ruling. *See* 77 FR 15656. The rulemaking proposes to remove the inadvertent requirement in the NSR PM<sub>2.5</sub> Rule that the measurement of condensable “particulate matter emissions” be included as part of the measurement and regulation of “particulate matter emissions.”<sup>5</sup>

## **B. PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule**

The PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule provided additional regulatory requirements under the PSD program regarding the implementation of the PM<sub>2.5</sub> NAAQS for NSR including:

(1) PM<sub>2.5</sub> increments pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS; (2) SILs used as a screening tool (by a major source

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<sup>5</sup> The term “particulate matter emissions” includes particles that are larger than PM<sub>2.5</sub> and PM<sub>10</sub> and is an indicator measured under various New Source Performance Standards (NSPS) at 40 CFR part 60. In addition to the NSPS for PM, it is noted that states have regulated “particulate matter emissions” for many years in their SIPs for PM, and the same indicator has been used as a surrogate for determining compliance with certain standards contained in 40 CFR part 63, regarding National Emission Standards for Hazardous Air Pollutants.

subject to PSD) to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment; and (3) a SMC, (also a screening tool) used by a major source subject to PSD to determine the subsequent level of PM<sub>2.5</sub> data gathering required for a PSD permit application. The SILs and SMC are numerical values that represent thresholds of insignificant, i.e., *de minimis*,<sup>6</sup> modeled source impacts or monitored (ambient) concentrations, respectively. EPA established such values to be used as screening tools by a major source subject to PSD to determine the subsequent level of analysis and data gathering required for a PSD permit application for emissions of PM<sub>2.5</sub>. EPA's authority to implement the SILs and SMC for PSD purposes has been challenged by the Sierra Club. *Sierra Club v. EPA*, Case No 10-1413 (D.C. Circuit Court).<sup>7</sup>

## **1. PSD Increments**

PSD increments prevent air quality in clean areas from deteriorating to the level set by the NAAQS. Therefore, an increment is the mechanism used to estimate “significant deterioration”<sup>8</sup> of air quality for a pollutant in an area. Under section 165(a)(3) of the CAA, a

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<sup>6</sup> The *de minimis* principle is grounded in a decision described by the court case *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1980). In this case, reviewing EPA's 1978 PSD regulations, the court recognized that “there is likely a basis for an implication of *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value.” 636 F.2d at 360. See 75 FR 64864.

<sup>7</sup> On April 6, 2012, EPA filed a brief with the D.C. Circuit court defending the Agency's authority to implement SILs and SMC for PSD purposes.

<sup>8</sup> Significant deterioration occurs when the amount of the new pollution exceeds the applicable PSD increment, which is the “maximum allowable increase” of an air pollutant allowed to occur above the applicable baseline concentration<sup>8</sup> for that pollutant. Section 169(4) of the CAA provides that the baseline concentration of a pollutant for a particular baseline area is generally the air quality at the time of the first application for a PSD permit in the area.



PSD permit applicant must demonstrate that emissions from the proposed construction and operation of a facility “will not cause, or contribute to, air pollution in excess of any maximum allowable increase or allowable concentration for any pollutant.” When a source applies for a permit to emit a regulated pollutant in an area that meets the NAAQS, the state and EPA must determine if emissions of the regulated pollutant from the source will cause significant deterioration in air quality. As described in the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule, pursuant to the authority under section 166(a) of the CAA, EPA promulgated numerical PSD increments for PM<sub>2.5</sub> as a new pollutant<sup>9</sup> for which NAAQS were established after August 7, 1977,<sup>10</sup> and derived 24-hour and annual PM<sub>2.5</sub> increments for the three area classifications (Class I, II and III) using the “contingent safe harbor” approach. See 75 FR 64869 and the ambient air increment tables at 40 CFR 51.166(c)(1) and 52.21(c). In addition to PSD increments for the PM<sub>2.5</sub> NAAQS, the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule amended the definition at 40 CFR 51.166 and 52.21 for “*major source baseline date*” and “*minor source baseline date*” (including trigger date) to establish the PM<sub>2.5</sub> NAAQS specific dates associated with the implementation of PM<sub>2.5</sub> PSD increments. See 75 FR 64864.

## **2. Significant Monitoring Concentrations**

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<sup>9</sup> EPA generally characterized the PM<sub>2.5</sub> NAAQS as a NAAQS for a new indicator of PM. EPA did not replace the PM<sub>10</sub> NAAQS with the NAAQS for PM<sub>2.5</sub> when the PM<sub>2.5</sub> NAAQS were promulgated in 1997. EPA rather retained the annual and 24-hour NAAQS for PM<sub>2.5</sub> as if PM<sub>2.5</sub> was a new pollutant even though EPA had already developed air quality criteria for PM generally. See 75 FR 64864 (October 20, 2012).

<sup>10</sup> EPA interprets 166(a) to authorize EPA to promulgate pollutant-specific PSD regulations meeting the requirements of section 166(c) and 166(d) for any pollutant for which EPA promulgates a NAAQS after 1977.

As mentioned above, the SMC numerical value represents a threshold of insignificant (i.e., *de minimis*) monitored ambient impacts on pollutant concentrations. In the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule, EPA established a PM<sub>2.5</sub> SMC of 4 µg/m<sup>3</sup> to be used as a screening tool by a major source subject to PSD to determine the subsequent level of PM<sub>2.5</sub> data gathering required for a PSD permit application. Using the SMC as a screening tool, sources may be able to demonstrate that the modeled air quality impact of emissions from the new source or modification, or the existing air quality level in the area where the source would construct, is less than the SMC (i.e., *de minimis*), and as such, may be allowed to forego the preconstruction monitoring requirement for a particular pollutant at the discretion of the reviewing authority.

Recently, the Sierra Club filed suit challenging EPA's authority to implement the PM<sub>2.5</sub> SILs<sup>11</sup> as well as the SMC for PSD purposes as promulgated in the October 20, 2012, rule. *Sierra Club v. EPA*, Case No 10-1413, D.C. Circuit Court. Specifically, regarding the SMC, Sierra Club claims that the use of SMCs to exempt a source from submitting a year's worth of monitoring data is inconsistent with the CAA. EPA responded to Sierra Club's claims in a Brief dated April 6, 2012, which describes the Agency's authority to develop and promulgate SMC.<sup>12</sup> A copy of EPA's April 6, 2010, Brief can be found in the docket for today's final rulemaking at [www.regulations.gov](http://www.regulations.gov) using docket ID: EPA-R04-OAR-2012-0555.

## **II. This Action**

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<sup>11</sup> As mentioned earlier, due to litigation by the Sierra Club, EPA is not taking final action on the SILs portion of the Florida March 15, 2012, SIP revision at this time but will take action once the court case regarding SILs implementation is resolved.

<sup>12</sup> Additional information on this issue can also be found in an April 25, 2010, comment letter from EPA Region 6 to the Louisiana Department of Environmental Quality regarding the SILs-SMC litigation. A copy of this letter can be found in the docket for today's rulemaking at [www.regulations.gov](http://www.regulations.gov) using docket ID: EPA-R04-OAR-2012-0555.

EPA is taking final action to approve into the Florida SIP portions of the State's March 15, 2012, SIP revision to adopt the PSD permitting regulations to implement the PM<sub>2.5</sub> NAAQS including the NSR PM<sub>2.5</sub> and PM<sub>2.5</sub> Increment-SILs-SMC Rules. FDEP's PSD program definitions and preconstruction permitting rules are found at rule 62-210.200, F.A.C., and rules 62-212.300 through 62-212.400, F.A.C., respectively and apply to major stationary sources or modifications constructed in areas designated attainment or unclassifiable/attainment as required under part C of title I of the CAA with respect to the NAAQS. These changes to Florida's rules became state effective on March 28, 2012. FDEP's SIP revision adopts the NSR PM<sub>2.5</sub> Rule PSD provisions including: (1) the requirement for NSR permits to address directly emitted PM<sub>2.5</sub> and precursor pollutants; (2) the amendment establishing significant emission rates for direct PM<sub>2.5</sub> and precursor pollutants (SO<sub>2</sub> and NO<sub>x</sub>) and recognizing PM<sub>2.5</sub> precursors for the definition of "*significant emission rates*" (at rule 62-21.200(282)) (as amended at 40 CFR 51.166(b)(23)(i)); and (3) the PSD requirement for states to address condensable PM in establishing enforceable emission limits for PM<sub>10</sub> and PM<sub>2.5</sub> (at 62-212.300(1)(f)) as promulgated at 40 CFR 51.166(b)(49). Additionally, Florida's March 15, 2012, SIP revision did not adopt the grandfathering provision at 40 CFR 52.21(i)(1)(xi) in accordance with the repeal of the PM<sub>2.5</sub> grandfathering provision.

Regarding the condensable provision and EPA's intent to amend the definition of "regulated NSR pollutant" as discussed in the March 16, 2012, correction rulemaking, Florida's March 15, 2012, SIP revision did not adopt the term "particulate matter emissions" regarding the requirement to consider condensables as promulgated in the NSR PM<sub>2.5</sub> Rule. *See* 77 FR 15656. As mentioned above, EPA is taking final action to approve into the Florida SIP the remaining

condensable requirement at 40 CFR 51.166(b)(49)(vi), which requires that condensable emissions be accounted for in applicability determinations and in establishing emissions limitations for PM<sub>2.5</sub> and PM<sub>10</sub>. Florida's March 15, 2012, SIP revision added definitions for "*condensable PM<sub>10</sub>*" at 62-210.200(94), "*condensable PM<sub>2.5</sub>*" at 62-210-200(95) and "*condensable PM*" at 62-210.200(93), for clarification purposes. EPA is taking final action to approve the aforementioned changes into the Florida SIP.

With respect to the PM<sub>2.5</sub> PSD Increment-SILs SMC Rule, EPA is taking final action to also approve into the Florida SIP the PSD increments for PM<sub>2.5</sub> annual and 24-hour NAAQS pursuant to section 166(a) of the CAA and SMC of 4 µg/m<sup>3</sup> for PM<sub>2.5</sub> NAAQS. The March 15, 2012, SIP revision: (1) revises the definition for "*maximum allowable increase*" to incorporate by reference (IBR) the PM<sub>2.5</sub> PSD increments numerical values (established in the ambient air increment tables at 40 CFR 51.166(c)(1) and 52.21(c) at 62-204.800, F.A.C.<sup>13</sup>); (2) amends the definitions for "*major source baseline date*" and "*minor source baseline date*" to establish relevant dates for PM<sub>2.5</sub> increment consumption and establish trigger dates (as established at 40 CFR 51.166(b)(14)(i)(c) and 51.166(b)(14)(ii)(c) respectively) and; (3) revises the definition for "*baseline area*" as promulgated at 40 CFR 51.166(b)(15)(i) and (ii) and adds definitions for "*baseline concentration*." The March 15, 2012, SIP submission also adds definitions for "*Class I Area*" and "*Class II Area*" at Chapter 62-210.200(77) and (78), F.A.C., respectively. The definition for Class I Area IBR 40 CFR part 81, Subpart D (the federal Class I Area list) at rule 62-204.800, F.A.C.

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<sup>13</sup> Florida IBR federal rules at rule 62-204.800 F.A.C.

Regarding the SILs and SMC, EPA's authority to implement the PM<sub>2.5</sub> SILs and SMC is currently the subject of litigation by the Sierra Club. In a brief filed in the D.C. Circuit on April 6, 2012, EPA described the Agency's authority under the CAA to promulgate and implement the SMCs and SILs *de minimis* thresholds. *Sierra Club v. EPA*, Case No 10-1413 D.C. Circuit. However, EPA is finalizing approval of the promulgated SMC thresholds into the Florida SIP (at rule 62-212.400(3)(e)1, F.A.C.) because the Agency believes the SMC is a valid exercise of the Agency's *de minimis* authority as well as the fact they are consistent with EPA's promulgated levels in the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule. The ongoing litigation may result in the court decision that may require subsequent rule revisions and SIP revisions from Florida.

In response to the litigation, EPA requested that the court remand and vacate the new regulatory text at 40 CFR 51.166(k)(2) and 52.21(k)(2) concerning the implementation of SILs for PM<sub>2.5</sub> so that EPA can make necessary rulemaking revisions to that text.<sup>14</sup> In light of EPA's request for remand and vacatur and our acknowledgement of the need to revise the regulatory text presently contained at paragraph (k)(2) of sections 51.166 and 52.21, the Agency has determined at this time not to approve the SILs portion of FDEP's March 15, 2012, SIP revision that contains the affected regulatory text in Florida's PSD regulations at rule, 62-212.400(5), F.A.C., and 62-210.200(283)(c), F.A.C. EPA will take action on the SILs portion of Florida's March 15, 2012, SIP revision in a separate rulemaking once the issue regarding the court case has been resolved.<sup>15</sup>

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<sup>14</sup> In the preamble to the October 20, 2010, final rule EPA indicates that the Agency does not consider the SILs to be a mandatory SIP element, but regard them as discretionary on the part of regulating authority for use in the PSD permitting process. *See* 75 FR 64864 at 64899.

<sup>15</sup> EPA is currently developing guidance to provide a provisional course of action to implement the PM<sub>2.5</sub> SILs pending revision to implementing (k)(2) provisions and the litigation. The guidance will ensure that the PM<sub>2.5</sub> SILs

### **III. Final Action**

EPA is taking final action to approve portions of Florida's March 15, 2012, SIP revision (with the exception of the SILs threshold and provisions), that adopt federal permitting regulations amended in the NSR PM<sub>2.5</sub> and the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rules to implement the PM<sub>2.5</sub> NAAQS for the NSR program because they are consistent with section 110 of the CAA and its regulations regarding NSR permitting.

### **IV. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

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are properly applied as part of a PSD compliance demonstration to show that a source's impact will not cause or contribute to a violation of the PM<sub>2.5</sub> NAAQS or increment.

- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the

rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).



**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference,  
Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements and  
Volatile organic compounds.

Dated: September 6, 2012

A. Stanley Meiburg  
Acting Regional Administrator,  
Region 4.

40 CFR part 52 is amended as follows:

**PART 52-[AMENDED]**

1. The authority citation for part 52 continues to read as follows:

Authority: 42.U.S.C. 7401 *et seq.*

**Subpart K – Florida**

2. Section 52.520(c) is amended under Chapters 62-210 and 62-212 by revising the entries for

“Section 62-210.200” and “Section 62-212.400 ” to read as follows:

**§52.520 Identification of plan**

\* \* \* \* \*

(c)\* \* \*

**EPA-Approved Florida Regulations**

State citation	Title/subject	State effective date	EPA approval date	Explanation
**	**	*	*	*
<b>Chapter 62–210 Stationary Sources—General Requirements</b>				
62–210.200	Definitions	March 28, 2012	[Insert date of publication in <u>Federal Register</u> ] [Insert citation of publication]	As of [Insert date of publication in <u>Federal Register</u> ], 61-210.200 does not include Florida’s revision to adopt the PM <sub>2.5</sub> SILs threshold and provisions (as promulgated in the October 20, 2010, PM <sub>2.5</sub> PSD Increment-SILs-SMC Rule at 40 CFR 52.21(k)(2)).

**	**	*	*	*
<b>Chapter 62–212 Stationary Sources—Preconstruction Review</b>				
62–212.400	Prevention of Significant Deterioration	March 28, 2012	[Insert date of publication in <u>Federal Register</u> ] [Insert citation of publication]	As of [Insert date of publication in <u>Federal Register</u> ], 61-212.400 does not include Florida’s revision to adopt the PM <sub>2.5</sub> SILs threshold and provisions (as promulgated in the October 20, 2010, PM <sub>2.5</sub> PSD Increment-SILs-SMC Rule at 40 CFR 52.21(k)(2)).
**	**	*	*	*

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[FR Doc. 2012-22976 Filed 09/18/2012 at 8:45 am; Publication Date: 09/19/2012]